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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,

Petitioner,

versus

ALBERT FLAKSA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RICHARD F. RALPH
510 Northeast Airlines Building,
Miami, Florida 33131
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,

Petitioner,

versus

ALBERT FLAKSA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 8, 1968, reversing a final decree of the United States District Court, Southern District of Florida, defaulting Respondent for failure to prosecute, and abide by orders regulating pre-trial procedure and attendance.

OPINIONS BELOW

District Court: Opinion contained in Final Decree, Appendix B hereto, has not been reported.

Fifth Circuit: Opinion, Appendix A hereto, is reported at 389 F2d 885 (Adv. No. 4, April 29, 1968).

JURISDICTION

The judgment of the Court of Appeals was entered February 8, 1968. The jurisdiction of this court is invoked under 28 U. S. Code, § 1254 (1).

QUESTIONS PRESENTED

The question which arises, particularly in the light of the decision of this Court in **Link** v. **Wabash R. R. Co.** (1962) 370 U. S. 626, and related cases, is whether the Court of Appeals was entitled and correct to create and impose limiting conditions precedent, of disciplinary action against Respondent's attorney or other lesser sanctions, upon the authority and exercised sound judicial discretion of the District Court, and thereby reverse the Final Decree of the District Court defaulting Respondent for failure to prosecute and failure to abide by orders and rules regulating pre-trial proceedings.

STATEMENT

The Admiralty and Maritime jurisdiction of the District Court was invoked on February 5, 1964, by the Petitioner filing a Petition for exoneration from or limitation of liability as owner of the vessel "Ducky" in respect to a flash fire on September 24, 1963, as the vessel lay afloat on Little River, at Miami, Florida, 28 U.S. Code, § 1331(1); 46 U. S. Code, § 185; (R. 1-7).

Issue was joined with the filing of Respondent's Answer and Claim on March 2, 1964. (R. 23; 28).

July 10, 1964, order for Pre-trial Conference on October 19, 1964, and trial on November 23, 1964, was entered and furnished counsel, which also provided for discovery cut off date, meeting of counsel, and the filing of a pre-trial stipulation (R. 40-49).

Petitioner in attempting to secure answers to interrogatories and thereafter items ordered produced by the court, drew attention to the pending order for pre-trial (R. 144).

Respondent had not prepared his case, had initiated no discovery, was not prepared to comply with the pre-trial order, and on October 12, 1964, served a petition to continue the pre-trial conference. The continuance was denied. (R. 145).

On October 28, 1964, counsel were advised to appear before the Court on October 30, 1964 (R. 145; 148). At this hearing the Court conducted an inquiry concerning the absence of a pre-trial stipulation on the pre-trial conference date of October 19, 1964. (R. 147-156). The attorney for Respondent in charge of and familiar with Respondent's case, though aware of the Court's instruction to appear before the Court on October 30, 1964, proceeded to a State Bar meeting and did not appear (R. 154).

The District Court on November 18, 1964, entered a Final Decree striking Respondent's Answer, dismissing Respondent's claim with prejudice, and entered judgment of exoneration in favor of Petitioner, for failure to prosecute with reasonable diligence and failure to abide by

orders and rules of the Court regulating pre-trial procedure (R. 146).

Respondent's Petition for Rehearing was denied after hearing (R. 196-197).

The Respondent appealed to the Court of Appeals for the Fifth Circuit (R. 197). That Court held dismissals with prejudice, absent personal participation of the litigant in the fault, improper without first imposing lesser sanctions and reversed the District Court's final decree (Appendix A; R. 204-213).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Fifth Circuit is in conflict with this Court's decision in **Link v. Wabash R. R. Co.** (1962) 370 U. S. 262, in rendering an authorized dismissal with prejudice in the sound exercise of judicial discretion by District Courts, subject to mandatory, artificial, conditions precedent of "disciplinary action against the erring attorney" or other lesser sanctions "where the facts are not such as to indicate that the litigant is a participant in the fault".

II.

The decision of the Fifth Circuit, and other recent decisions of that Court, are believed in conflict with the decisions:

of the First Circuit in **Kelly v. U. S.** (1964) 338 F2nd 329; which expressly declined the alternative adopted by the Court of Appeals in this case;

of the Second Circuit in **Diapulse Corp. of Amer. v. Curtis Publishing Co.** (1967) 374 F2d 442; **Jones v. Uris Sales Corp.** (1967) 373 F2d 644; **West v. Gilbert** (1966) 361 F2d 314; **Deep South Oil Company of Texas v. Metropolitan Life Ins. Co.** (1962) 310 F2d 933; **Joseph v. Norton Company** (1959) 273 F2d 65;

of the Third Circuit in **Payne v. S. S. Nabob** (1962) 302 F2d 803;

of the Seventh Circuit in **Estava v. The House of Seagram, Inc.** (1963) 314 F2d 829; **Link v. Wabash R. R. Co.** (1961) 291 F2d 542, affirmed (1962) 270 U.S. 626; **Jameson v. DuComb** (1960) 275 F2d 293;

of the Eighth Circuit in **Janousek v. French** (1961) 287 F2d 616;

of the Ninth Circuit in **Fitzsimmons v. Gilpin** (1966) 368 F2d 561; **Agnew v. Moody** (1964) 330 F2d 871; **United States v. Pacific Fruit & Produce Co.** (1943) 138 F2d 367; **Hicks v. Bekins Moving & Storage Co.** (1940) 115 F2d 406; and

of the Tenth Circuit in **Sweeney v. Anderson** (1942) 129 F2d 756.

The authority and exercise of sound judicial discretion on the part of District Courts in dismissing with

prejudice has been sustained uniformly without conditions precedent of personal fault of litigant, or prior imposition of disciplinary action against the attorney or other lesser sanctions against the attorney or party.

CONCLUSION

Contrary to this Court's Link decision, and contrary to the authority and exercise of sound judicial discretion of District Courts as understood and administered in other Circuits; the decision below is clearly erroneous. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

RICHARD F. RALPH
510 Northeast Airlines Building,
Miami, Florida 33131
Attorney for Petitioner

APPENDIX A

[NUMBER AND TITLE OMITTED]

Appeal from the United States District Court for the Southern District of Florida.

(February 8, 1968.)

Before BROWN, Chief Judge, JONES, Circuit Judge, and BREWSTER, District Judge.

BREWSTER, District Judge: This admiralty proceeding was begun by appellee's petition for exoneration from or limitation of liability for damages resulting from a flash fire on a self-propelled barge owned by it. The appellant filed an answer to the petition and a claim for damages for alleged serious personal injuries growing out of the incident. Eight months after issue was joined, the trial court *sua sponte* entered an order striking the appellant's answer to the petition, dismissing his claim with prejudice, and decreeing that appellee was not responsible for the fire or liable for any damages resulting from it. The basis for the order was that appellant's proctor had "failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects", and that the sum total of his conduct amounted to a failure to prosecute his claim with reasonable diligence. A motion by appellant for rehearing under Rule 60(b), F.R.Civ.P. was overruled. The case is now before us on the sole question of whether the order was too drastic under the circumstances.

The order in question was entered after the appellant's proctor having the responsibility for trying the case failed to appear at a pre-trial conference. There was a background of that proctor's dereliction and failure to meet his responsibilities at every stage of the proceeding from the time issue was joined. The poorly prepared partner appellant's proctor sent to the pre-trial conference to act as his substitute put it mildly when he said at the beginning of the hearing: "Judge, I am not going to tax your patience with excuses. I think that our office has been derelict in its duty to the Court and I want you to accept my apologies. Although it is a sincere apology, I doubt if it is much comfort to you in a situation like this. I can't think of a worse time to come before the Court without a pre-trial stipulation which was following up the proceedings before." In spite of the fact that notice of the pre-trial conference was given only one hundred days before the date it was to be held, appellant's proctor completely ignored all provisions of the order relating to the preliminary work of counsel so necessary to make pre-trial effective. He came to the pre-trial conference totally unprepared, with nothing to offer except a motion for continuance. Even though the motion had no merit, the Court granted a few days additional time with instructions that the pre-trial conference would be called at the first opportunity on short notice. Appellant's proctor did nothing more during the following eleven days of grace. After he received notice of the new date for the pre-trial conference, he decided it was more important for him to go to a meeting in another city, and sent to the conference another member of the firm who had never heard of the case until the afternoon before the hearing. The proctor for the appellee had made ar-

rangements to attend the same meeting, but cancelled his plans in order to be present at the pre-trial proceeding.

As is true in most cases of dereliction of counsel, appellant's proctor had his excuses. The real meaning of most of them was that he just had something he thought was more important every time he had a responsibility to meet during the discovery and pretrial preparation stages of this case. His trouble was that he was doing too much judging and too little advocating. He always made the decisions on the validity of his excuses expecting the judge to manage his docket accordingly.[1] There is, however, nothing whatever in the record to indicate that the appellant had any knowledge of, or participation in, any of the derelictions of his counsel.

It is well established that the district court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure.[2] While the authority is re-iterated in

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[1] "... With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it. In our opinion, this falls short of being a legitimate excuse for failing to appear in court at the time fixed." Link v. Wabash R. Co., 7 Cir., 291 F. 2d 542, 544 (1961), affirmed 270 U.S. 626, 82 S.Ct. 1386, 8 L. ed. 2d 734 (1962).

"Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file papers required in a law suit. Chaos would result..." Smith v. Stone, 9 Cir., 308 F. 2d 15, 18 (1962), quoted with approval in Nasser v. Isthmian Lines, 2 Cir., 331 F. 2d 124, 128 (1964).

[2] Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L. ed. 2d 734 (1962), affirming 7 Cir., 291 F. 2d 542; United States v. Proctor & Gamble Co., 356 U. S. 677, 78 S.Ct. 983, 2 L. ed. 2d 1077 (1958); Marshall v. Southern Farm Bureau Casualty Co., D.C.La., 36 F.R.D. 186, affirmed, 5 Cir., 353 F. 2d 737 (1966), cert. den. 384 U.S. 910; Durgin v. Graham, 5 Cir., 372 F. 2d 130 (1967); Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co., 2 Cir., 310 F. 2d 933 (1962); Demeulenaere v. Rockwell Mfg. Co., 2 Cir., 312 F. 2d 209 (1962); Trans World Airlines, Inc. v.

some of the Federal Rules of Civil Procedure for particular situations, the power is one inherent in the courts "in the interest of the orderly administration of justice."[3] It may be exercised *sua sponte* under proper circumstances.[4] The exercise of the authority is discretionary, and is subject to review for abuse of discretion.[5] Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations,[6] as the court has a wide range of lesser sanc-

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Hughes, 2 Cir., 332 F. 2d 602 (1964); West v. Gilbert, 2 Cir., 361 F. 2d 314 (1966); Diapulse Corp. of America v. Curtis Pub. Co., 2 Cir., 374 F. 2d 442 (1967); O'Brien v. Sinatra, 8 Cir., 315 F.2d 637 (1963); Montgomery v. C.I.R., 9 Cir., 367 F. 2d 917 (1966); Fitzsimmons v. Gilpin, 9 Cir., 368 F. 2d 561 (1966); Meeker v. Rizley, 10 Cir., 324 F. 2d 269 (1963). Annotation: *Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order*, 4 A.L.R. 2d 348. 5 Moore, Federal Practice, 2d ed., p. 1041.

[3]"... It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures, and to impose appropriate sanctions for failure to comply. The authorities are all to the contrary." Link v. Wabash R. Co., 7 Cir., supra, note 1, at p. 545 of 291 F. 2d.

"The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered as an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases..." Link v. Wabash R. Co., supra note 1, at p. 630 of 370 U.S.

"Moreover the dismissal was within the inherent power of the court to enforce its orders and manage its affairs." Marshall v. Southern Farm Bureau Cas. Co., 5 Cir., 353 F. 2d 737 (1966).

[4]See cases cited in footnote 2.

[5]See cases cited in footnote 1.

[6]"The dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies, and should be applied only in extreme circumstances..." Independent Productions Corp. v. Loew's Inc., 2 Cir., 283 F. 2d 730, 733 (1960).

"...The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion..." Durgin v. Graham, 5 Cir., 372 F. 2d 130, 131 (1967).

tions.[7] These rules are applicable to admiralty proceedings.[8]

This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases,[9] has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of *Durham v. Florida East Coast Ry. Co.*, 385 F. 2d 366, where Judge Wisdom, after recognizing the inherent power now under discussion, said: " . . . The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumaceous conduct by the plaintiff . . . " Other cases by this Court emphasizing the importance, except in the most flagrant circumstances, of resorting to sanctions that do not deprive a litigant of his day in court are *Woodham v. American Cystoscope Company of Pelham, N. Y.*, 335 F. 2d 551 (1964), and *Council of Federated Organizations v. Mize*, 339 F. 2d 898 (1964). We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both. The inherent power of a court to manage

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[7]Woodham v. American Cystoscope Company of Pelham, N. Y., 5 Cir., 335 F. 2d 551, 556 (1964). See also: Annotation: *Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order*, 4 A.L.R. 2d 348; Waterman, *An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders*. 29 F.R.D. 420 (1961); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col. L. Rev. 480 (1958); Comment, *Sanctions at Pre-Trial Stages*, 72 Yale L. Jour. 819 (1963); 3 Moore, Federal Practice, 2d ed. pp. 1129-1130.

[8]L. Skalney Basket Co. v. U. S. Rednik, 2 Cir., 312 F. 2d 177 (1963); Kelley v. United States, 1 Cir., 338 F. 2d 328 (1964). (These cases are cited because the judgment in this case was entered prior to 1966).

[9]Marshall v. Southern Farm Bureau Cas. Co., supra, note 3.

its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.[10] The *Woodham* case, *supra*, at p. 557, says that "courts may resort to disciplinary action against the erring attorney," and quotes with approval the following from *Sanctions at Pre-Trial Stages*, 72 Yale L. Jour. 819, 830:

> " . . . In addition, alternative modes of discipline against the attorney might include: (1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded. It seems fairly clear that the judicious use of such measures would tend to promote attorney compliance in the first instance."

We are convinced that the able trial judge was more than patient under the circumstances, but we feel that

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[10]See also texts cited in footnote 7. The view taken by this Court that the trial court has the inherent power to impose reasonable sanctions upon an errant attorney, where appropriate, indicates approval of the observations of Chief Judge Biggs and Judge Goodrich in the following quotations from their respective dissenting opinions in Gamble v. Pope & Talbert, Inc., 3 Cir., 307 F. 2d 229 (1962):

Chief Judge Biggs:

"The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secured certain privileges and also assumes definite obligations.

"The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record. . ." 307 F. 2d, at 735.

Judge Goodrich:

"Now the judge may also discipline the members of the bar of his court and, in cases calling for it, may suspend them or punish them for contempt. It seems to me clear that with all this authority which the judge undoubtedly has that he can also impose sanctions for the disciplining of lawyers who, in matters not amounting to contempt, do not obey rules. If a judge is going to organize, either alone or with fellow judges, the business of the court, there must be authority to impose reasonable sanctions for the breach of reasonable rules." 307 F. 2d, at p. 737.

he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. Since this was apparently a single claim limitation proceeding, striking the appellant's claim and answer left the petition for limitation undenied which in turn results in the Court in effect granting exoneration and denying privity, either or both of which are frequently formidable issues for the shipowner. This proceeding was filed only a short time after the occurrence of the flash fire that gave rise to it, and it was less than a year old at the time it was dismissed. There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute. The appellant was in no way connected with or responsible for, his proctor's dilatory conduct. While we do not condone that conduct, we feel that the circumstances of the case are not such that the appellant should lose his day in court,[11]

The judgment is reversed with directions to re-instate the case to its status as of the time the final decree was entered. It will be within the trial court's discretion to impose reasonable sanctions upon the appellant or his proctor, or both, short of final disposition of the case without an opportunity to be heard. In arriving at his decision, the trial judge may take into account the full record of conduct in this case from the beginning. *Diapulse Corp. of America v. Curtis Pub. Co.*, 2 Cir., 374 F.2d 442, 447 (1967).

REVERSED.

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[11]We do not intend to leave the impression that no sanctions may be imposed upon an innocent litigant for derelict conduct of his counsel. Link v. Wabash R. Co., supra note 1, expressly recognizes that a litigant can be held responsible for such conduct. The Federal Rules of Civil

APPENDIX B

[NUMBER AND TITLE OMITTED]

(Filed November 18, 1964)

This cause was instituted on the filing of a Petition for Exoneration from or limitation of liability by the above-named Petitioner, on February 5, 1964, praying for exemption from or limitation of liability for certain loss, damage, destruction and injury growing out of a fire or explosion on board its non-descript, self-propelled vessel known as "DUCKY", which occurred on or about the 24th day of September, 1963, while afloat and docked on Little River, adjacent to premises commonly known as 750 N.E. 79th Street, Miami, Dade County, Florida. Monition was duly issued dated February 6, 1964. Claimant, Albert Flaksa, filed answer to the petition and claim for personal injuries dated February 28, 1964. By order dated April 20, 1964, the defaults of other than Albert Flaksa were noted.

In accordance with the rules and practice of this Court, order for pre-trial conference and notice of trial dated July 10, 1964, was entered and furnished proctors, which order among other things provided for pre-trial conference on October 19, 1964, and for trial on November 23, 1964.

Procedure contemplate it. We are saying that where the facts are not such as to indicate that the litigant is a participant in the fault, sanctions finally depriving him of his day in court should be the last resort. This Court, in the *Woodham* case, supra, 335 F. 2d, at p. 557, suggests a conditional order of dismissal or disciplinary action against the erring attorney as some of the available effective lesser sanctions in proper cases.

Petitioner thereafter propounded interrogatories and filed motions for production and for compulsory physical examination within the times permitted by such order. These interrogatories, after prompting by Petitioner's proctors, were belatedly answered August 19, 1964. The motions to produce were granted by order dated and filed September 11, 1964, requiring production within ten days from the date thereof. These matters were material to the content of a pre-trial stipulation required by such pre-trial order, to which proctor for Petitioner had drawn attention in seeking compliance therewith on the part of Claimant.

On the morning of October 12, 1964, proctor for Claimant requested proctor for Petitioner to indicate agreement to a proposed continuance on the part of Claimant of the pre-trial conference as Claimant's case was not prepared, Claimant's proctor was not prepared to pre-try the case, and Claimant desired a continuance to re-open the Claimant's discovery. Proctor for Petitioner advised he was willing to meet with proctor for Claimant that day or any time proctor for Claimant was willing to meet. Proctor for Claimant at 3:45 P.M., October 12, 1964, served a motion to produce and a petition to continue pre-trial on proctor for Petitioner, noticing same for the time and date of pre-trial conference. On October 14, 1964, proctor for Petitioner received under cover of Claimant's proctor's letter dated October 13, 1964, copy of those matters required to be produced excepting a bill from one doctor. Claimant's petition to continue pre-trial recites in material part that "Proctors for Claimant have been unable to complete necessary discovery in order to simplify the issues in this matter." The file in this cause reflects no discovery pro-

cedures instituted by Claimant during the pendency of this cause except the motion to produce served October 12, 1964, which was not timely and was contrary to the terms of the pre-trial order dated July 10, 1964. The petition to continue pre-trial and motion to produce were denied in the presence of proctors on October 19, 1964.

Upon further review of the file, the Court caused proctors for the parties to be advised by telephone communication to their offices to appear before the Court on October 30, 1964. The proctor for Petitioner who had actively engaged in the case on behalf of Petitioner appeared; the proctor for Claimant who had actively engaged in the case on behalf of Claimant did not appear, the Court being advised he had proceeded to a State Bar meeting although knowledgeable of the circumstances, including the telephonic advices to his office. Another attorney appeared in his stead. A transcript of the conference before the Court on October 30, 1964, is a part of the record and file of this cause.

The Court finds from the file and record in this case, including the pleadings of the Claimant, that Claimant and his proctors have failed to prosecute his claim with reasonable diligence; and that Claimant and his proctors have failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects.

It is, therefore, hereby

ORDERED, ADJUDGED, AND DECREED:

1. That the claim of the Claimant, Albert Flaksa, be and the same is hereby dismissed with prejudice, and his answer to the Petition herein be and the same is hereby stricken.

2. That the fire or explosion described in the Petition was not caused by the design or neglect of the Petitioner, Little River Marine Construction Co., Inc., and did not occur with the privity or knowledge of said Petitioner.

3. That the said Petitioner be, and it hereby is, forever exempted and discharged from all loss, damage, destruction or injury arising from or growing out of the said fire or explosion.

DATED at Miami, Florida, the 18th day of November, 1964.

S/ Charles B. Fulton
UNITED STATES DISTRICT JUDGE

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SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,
Petitioner,

versus

ALBERT FLAKSA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALTER H. BECKHAM
Attorney for Respondent
2nd Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

OF COUNSEL:
PODHURST & ORSECK
Concord Building
Miami, Florida 33130

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,
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versus

ALBERT FLAKSA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, Albert Flaksa, files this brief in opposition to the petition for writ of certiorari heretofore filed in this Court.

The petitioner, Little River Marine Construction Co., Inc., seeks review of a judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing a

NOTE: All Emphasis Supplied.
R.: Record on Appeal.
P.: Petition for Writ of Certiorari.

judgment or decree of the United States District Court, Southern District of Florida, which, in a limitation of liability proceeding instituted by the petitioner, (1) dismissed with prejudice the respondent's claim for personal injuries, and (2) struck his answer to the petitioner's petition for exoneration from, or limitation of, liability and exempted and discharged the owner from all loss.

The stated ground of the final judgment or decree of the District Court was the failure of the claimant and his proctors to prosecute his claim with "reasonable diligence" and to abide by certain discovery and pre-trial rules of the Court (R. 144-146, 197; P. 14-16). The final decree was entered only slightly over nine months after the cause was commenced, and just shortly beyond a year after the respondent was burned in the flash-fire accident involved (R. 1-7, 146, P. 13).

In a carefully reasoned opinion, the Fifth Circuit reversed, 389 F.2d 885.

I

OPINIONS BELOW

District Court: Opinion contained in Final Decree, Appendix B to the petition for writ of certiorari, pages 14 through 17 of the petition; not reported.

Fifth Circuit: Opinion, 389 F.2d 885, contained in Appendix A to the petition for writ of certiorari, pages 7 through 13.

Briefly stated, the trial court found the following derelictions and failures which it claimed supported its dismissal for want of prosecution with reasonable diligence:

(a) Failure of respondent to timely answer interrogatories (R. 50, 144; P. 15);

(b) The failure timely to respond to the ten day order granting motion to produce medical bills and tax returns from the year 1960, which order was dated and filed September 11, 1964 (R. 66-67; 144; P. 15);

(c) Failure of the proctor for the respondent to meet with proctor for the petitioner to prepare a pre-trial stipulation on October 12, 1964, or prior to October 19, 1964, the original date set for pre-trial (R. 144-145; P. 15-16);

(d) The failure of one of the proctors for the respondent to appear at a renewed pre-trial on October 30, 1964, notice of which had been given the day before (R. 145-146; P. 15-16).

The Fifth Circuit Court of Appeals in reversing, noted derelictions of counsel, chastised him, and then in view of the circumstances of the case, stated in relevant part as follows:

> "It is well established that the District Court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure. While the authority is reiterated in

some of the Federal Rules of Civil Procedure for particular situations, the power is one inherent in the court 'in the interest of the orderly administration of justice'. It may be exercised *sua sponte* under proper circumstances. The exercise of the authority is discretionary, and is subject to review for abuse of discretion. Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations, as the court has a wide range of lesser sanctions. These rules are applicable to Admiralty proceedings." (389 F.2d 885, et seq., P. 9-11, citing cases). (Emphasis theirs).

The Fifth Circuit then clearly recognized the *power* of the court to impose this sanction in certain circumstances but added:

"This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases, has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, where Judge Wisdom, after recognizing the inherent power now under discussions, said: ' . . . The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. . . .'." (389 F.2d 885, et seq.; P. 11).

The Fifth Circuit was of the opinion that there were lesser sanctions which could and should have been imposed here, short of final dismissal, under the circumstances, and listed various of them with particularity. These included 1) reprimand of the attorney; 2) contempt adjudication; 3) prohibition against practicing for a limited time before the court whose order was neglected. (P. 11-12). The Court concluded as follows:

> "We are convinced that the able trial judge was more than patient under the circumstances, but we feel that he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. Since this was apparently a single claim limitation proceeding, striking the appellant's claim and answer left the petition for limitation undenied which in turn results in the Court in effect granting exoneration and denying privity, either or both of which are frequently formidable issues for the shipowner. *This proceeding was filed only a short time after the occurrence of the flash fire that gave rise to it, and it was less than a year old at the time it was dismissed.* There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute. The appellant was in no way connected with or responsible for his proctor's dilatory conduct. *While we do not condone that conduct, we feel that the circumstances of the case are not such that the appellant should lose his day in court.*" (P. 12-13). (Emphasis supplied).

II

QUESTION PRESENTED

The respondent disagrees with the question presented as framed in the petition (P. 2). Rather the question here is simply: Whether the Court of Appeals appropriately reviewed for abuse of discretion the harsh sanction of dismissal and striking of pleadings, and entry of final adverse decree imposed by the District Court for want of reasonable diligence in prosecution of the claim, and failure of counsel to abide by certain pre-trial orders, upon the unique facts presented.

III

STATEMENT

The Fifth Circuit Court of Appeals found various derelictions by counsel, and called him to task for them, but nevertheless found an abuse of discretion in the harsh sanction imposed by the trial court under the circumstances, just over nine months after the litigation commenced and only little more than a year after the occurrence of the flash fire involved (R. 1-7, 46; P. 13). The following is a review of the record actually before the courts below, with reference to the reasons stated by the District Court in imposing and adhering to the ultimate final sanction:

a. Untimely answers to interrogatories

1. Complete answers to the petitioner's interrogatories were filed perhaps two weeks beyond the date pro-

vided for in the rules (R. 59-66). These answers were filed on August 19, 1964, two months earlier than the scheduled pre-trial (R. 40). No order to compel answers was filed or required.

2. Virtually, all of the information which had been sought in the interrogatories was already in the hands of the petitioner prior to the time they were filed. A complete discovery deposition inquiring into subject matter sought in the interrogatories of the petitioner had been taken on March 18, 1964 (R. 67-137).

3. The petitioner had full knowledge of the respondent's earnings and, for the most part, his medical expenses incurred and paid by the Workmen's Compensation carrier, inasmuch as the respondent had been employed by the petitioner for a period of five years prior to the date of the accident and, indeed, was injured in the course of employment (R. 63, 76, 106, 115, 117-118, 175).

b. Delay in producing medical bills and tax returns

1. The record clearly reveals that the delay in producing the medical bills was caused by a recalcitrant physician and not by the respondent (R. 181-183).

2. The petitioner, respondents' employer, had full knowledge of the respondent's income for the years covered by the returns long before their production. Statements of income had been furnished in the answers to the interrogatories and the petitioner-employer was well aware of just what the respondent had been earning (R. 63).

3. Moreover, the petitioner had knowledge of the medical bills incurred as a result of the accident up to the date of the answers to interrogatories (R. 64-65), and, as an employer, had access to bills for accident connected treatment. No prejudice or undue delay of trial could be found because of the delay in furnishing repetitious information.

c. Failure of respondent's proctor to meet with petitioner's proctor to prepare pre-trial stipulation prior to October 19, 1964

1. The local practice imposed upon the proctor for the petitioner, as well as the proctor for the respondent, the affirmative duty to seek a date to discuss a pre-trial stipulation. The pre-trial stipulation, under the pre-trial order, was due on October 9, 1964 (R. 41, 42-44).

2. The first telephone call that was made by any attorney with regard to the stipulation was made by the proctor for the respondent to the proctor for the petitioner on October 12, 1964 (R. 144, 168). At that time, both attorneys already were in default and the respondent's attorney pointed out that he could not then meet because of a heavy trial schedule (R. 169-170). Thus, if any dereliction there was, it was on the part of the proctors for both parties and both appeared on October 19, 1964, without a pre-trial stipulation.

3. It is true that the respondent's motion to continue the pre-trial was denied as was his request for further discovery, and that this was justified. The Court's order of November 2, 1964, reflecting its disposition of matters presented on October 19, 1964, indicated that a new date

would be set for filing of the pre-trial stipulation (R. 142) and its records of the October 19 conference state that the pre-trial itself was to be re-set on short notice (R. 157). At this point, the dereliction, if any, was traceable to the petitioner's proctor to at least as great an extent as the respondent's particularly in view of the local custom imposing upon the proctor for the petitioner, who had instituted the limitation proceedings, the initial responsibility for arranging the conference with his adversary to prepare the pre-trial stipulation (R. 174).

d. Failure of one of respondent's proctors to appear at a renewed pre-trial on October 30, 1964

1. The pre-trial order called only for the presence of an attorney fully knowledgeable as to the facts and with full authority to act (R. 41-42). The petitioner's co-proctor did in fact appear on October 30, 1964, upon one day's notice, for the pre-trial which had been reset pursuant to the court's order. The record clearly reveals that he was fully empowered to act and actually possessed a proposed detailed and complete pre-trial stipulation (R. 163-167).

2. The absence of the *other* co-proctor in no way violated the pre-trial order of the court. Moreover, between October 19th and October 30th, again no effort had been made by the proctor for the petitioner to contact the proctors for the respondent to agree on a pre-trial stipulation (R. 170-171).

3. At the October 30 pre-trial, the proctor for the petitioner likewise came with a proposed pre-trial statement. Thus, a full pre-trial could have been had on October 30, 1964, and the proctor for the respondent was at

that time prepared to pre-try the case on that date and to try the case at any time fixed by the court (R. 159-160, 163-169, 172).

4. Moreover, on October 30, 1964, no new date for filing of the stipulation had been set pursuant to the court's order indicating that it would reset the date for such filing (R. 142)

5. The record clearly demonstrates that the respondent stood ready, willing and able to proceed to *trial of the case.* There was no *wilful* misconduct and there would have been no delay in the trial of the cause had the matter not been dismissed (R. 169). No bad faith or wilful neglect was demonstrated (R. 169-170).

IV

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There simply is no conflict of this decision (389 F.2d 885) with other decisions of other Circuit Courts of Appeal on the same issue; nor is there any conflict with any prior decisions of this Court; nor was any grave or important question involving Federal law or procedure presented or passed upon; nor was any departure from accepted standards of judicial procedure demonstrated; and thus no writ of certiorari should issue here. (See Rules of United States Supreme Court, Rule 19). All that was involved in the Fifth Circuit was a review for abuse of discretion, and a finding of such, under a unique set of circumstances; and the reinstatement of an innocent admiralty claimant's cause, which had been dismissed—prior

to the claimant's day in court—for certain conduct of his counsel. The Fifth Circuit, properly reviewing for abuse, found the sanction too severe under the circumstances. Thus, there is no reason at all for this Court to take jurisdiction of the matter.

Throughout its opinion, the Court of Appeals *recognized the power* of the trial court under appropriate circumstances to dismiss with prejudice, in its discretion (reviewable for abuse), for lack of prosecution or neglect of court orders by counsel, on the authority of *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386; but the Court also held that in the circumstance of this case, there was an abuse of discretion, no such action was warranted, and a sanction so harsh in nature should not have been imposed.

The Court ruled that under the facts here, and since the litigant was not a participant in the fault, the sanction finally depriving him of his day in court should have been a last resort only, and other lesser sanctions imposed.

The cases cited by the petitioner are readily distinguishable because of the gross derelictions involved. They involve totally different factual backgrounds. They uniformly hold, however, that the power and discretion to dismiss for failure to comply with pre-trial orders *is* subject to review for abuse. They demonstrate the extreme type of situation—absent here—which supports the ultimate sanction.

1. In *Hicks v. Bekins Moving & Storage*, 9 Cir. 1940, 115 F.2d 406, the case had been called for assignment sixteen times between December 30, 1937 and November 7,

1939. At the call on November 7, 1939, no representative for the plaintiff appeared. Thus, final dismissal with prejudice was warranted.

2. In *Jameson v. DuComb*, 7 Cir. 1960, 275 F.2d 293, the plaintiff moved for a continuance on the *trial date* upon the grounds that the plaintiff himself was engaged in guiding big game hunts in Alberta and could not be available. The court held that the plaintiff, who had instituted the action, should have been available for trial and his non-appearance justified final dismissal.

3. In *Janousek v. French*, 8 Cir. 1961, 287 F.2d 616, the plaintiff and his counsel failed to appear at the trial after a motion for continuance, itself invalidly made, had been denied. Final dismissal resulted.

4. In *Joseph v. Norton Co.*, 2 Cir. 1959, 273 F.2d 65, the trial attorney refused to proceed with his case contending that his assistant, who was the attorney of record, was ill. There was absolutely no showing that the trial attorney required any aid or that he could not go forward. Final dismissal was justified.

5. In *Link v. Wabash R.R. Co.*, 370 U.S. 262, 82 S. Ct. 1386, the plaintiff's attorney telephoned the court that he would not be available for the pre-trial on the date scheduled. The case was *six years old* and the oldest on the trial court's calendar. The entire record showed a history of dereliction and delay which justified a finding of deliberate procrastination or inexcusable neglect. The United States Supreme Court held that the trial court had the discretion to dismiss with prejudice in such a gross situation.

6. In *Payne v. S. S. Nabob*, 3 Cir. 1962, 302 F.2d 803, the court merely held that theories of liability advanced at the pre-trial limited the plaintiff, and witnesses not listed in the pre-trial memorandum could not be used.

7. In *Agnew v. Moody*, 9 Cir. 1964, 330 F.2d 868, 871, a plaintiff suffered a dismissal of his complaint with twenty days' leave to file an amended complaint. Two and one-half months beyond the twenty days allowed elapsed, and no amended complaint was filed. The trial court dismissed and, on appeal, the Ninth Circuit held that under the circumstances of the case, this exercise of discretion or power was proper.

8. In *Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co.*, 2 Cir. 1962, 319 F.2d 933, the plaintiff did not appear at three calendar calls after the cause was two years old. A sixty day order was entered; but plaintiff obtained an extension to prepare. Several more extensions or continuances were sought and obtained. Counsel withdrew, the plaintiff sought to put the case over for a substantial time; new counsel appeared and said he needed substantial time, and that a few days would not suffice. The cause was dismissed after four and one-half years of delay. The dismissal, under such circumstances, properly was affirmed.

9. In *Diapulse Corp. of America v. Curtis Publishing Co.*, 2 Cir. 1967, 374 F.2d 442, the Second Circuit, in reviewing for an abuse of discretion, found none. There, in a libel suit, the plaintiff simply refused and failed to obey a discovery order as to matter which was the gravaman of the case. Over a period of months, the plaintiff's president just failed wilfully and flagrantly, as the trial court

found, to abide by the production order. Moreover, there was an extreme history of disappearance, misplacing and "losing" of documentary evidence, and other evasions and dilatory tactics. Dismissal was affirmed, under the flagrant facts there, against a challenge of abuse of discretion.

10. In *Estava v. The House of Seagram, Inc.*, 7 Cir. 1963, 314 F.2d 829, the case was dismissed with prejudice after it had been pending for no less than six and one-half years. When the case finally did come to trial, the plaintiff simply was not ready and during the first day of trial could not testify because of claimed effects of a toothache; then simply failed to show up at the scheduled hour the following day. Obviously, dismissal was warranted and properly affirmed.

11. In *Fitzsimmons v. Gilpin*, 9 Cir. 1966, 368 F.2d 561, the plaintiff disregarded local rules and did not have local counsel appointed and did absolutely nothing for a period of over fifteen months, despite the applicable one-year failure to prosecute rule. There was no showing for the delay. The case just sat. Dismissal as a proper exercise of discretion was affirmed.

12. In *Jones v. Uris Sales Corp.*, 2 Cir. 1967, 373 F.2d 644, the Court struck the defendant's answer for failure to abide by orders of court. The president and principal of the defendant company failed to show up at a deposition; and repeatedly and flagrantly, for a period of nearly a year, avoided court orders and did not produce *available* and relevant materials. Under such circumstances, no abuse of discretion could be found in resulting dismissal.

13. In *Kelly v. U. S.*, 1 Cir. 1964, 338 F.2d 328, despite the fact that information had long since been furnished to counsel, interrogatories deliberately were not answered and the failure to answer was in the face of a court order to answer certain interrogatories, in an effort by counsel to obtain an unfair advantage at trial. Dismissal was proper there as an exercise of discretion and was affirmed.

14. In *Sweeney v. Anderson*, 10 Cir. 1942, 129 F.2d 756, non-resident plaintiff's counsel died. Eighty-one days elapsed and there was no showing that the plaintiff did anything to secure local counsel. The plaintiff did not appear at the trial nor did his personal attorney—a non-resident—appear. An offer to postpone the trial was ignored. Dismissal properly was affirmed.

15. In *U. S. v. Pacific Fruit & Produce Co.*, 9 Cir., 1943, 138 F.2d 367, at the trial, the United States could not prove its case and had been derelict in obtaining the necessary proof over a period of *two* or *three years;* the U. S. sought a voluntary dismissal. The final dismissal was affirmed as a proper exercise of the trial court's power and discretion.

16. In *West v. Gilbert*, 2 Cir., 1966, 361 F.2d 314, the opinion revealed that the case was two and one-half years old when a sixty day order was entered requiring the plaintiff to go forward to bring the action to a conclusion or to file a note of issue, which was not complied with. The opinion reveals that the case was three and one-half years old when a re-opening or vacating of the default order was sought. Under such circumstances, no abuse of discretion was found in dismissal.

Manifestly, none of the gross situations present in those cases were present here. In practical effect, the only order actually violated concerned actual filing of an agreed pre-trial stipulation on or before a certain date. At no time was there a willful non-appearance. *And the respondents proctor stated he was ready and able to proceed to trial at the time set by the court.* Accordingly, the case is governed by authorities such as *Woodham v. American Cystoscope Company of Pelham, New York*, 5 Cir. 1964, 335 F.2d 551; *Council of Federated Organizations v. Mize*, 5 Cir. 1964, 339 F.2d 898; *Gamble v. Pope & Talbot, Inc.*, 3 Cir. 1962, 307 F.2d 729; *International Harvester Co. v. Rockwell Spring & Axle Co.*, 7 Cir. 1964, 339 F.2d 949; and *Padonini v. Bruchausen*, 2 Cir. 1961, 293 F.2d 546; and cases cited in the opinion of the Fifth Circuit here. The respondent was severely injured. No flagrant violation of the court's orders has been shown. If there were some dereliction, a conditional order of dismissal, or some disciplinary action against the proctor, would have been sufficient sanction under the facts of this case. The Fifth Circuit so held in evaluating this record. But the claimant, in admiralty, should not have been conclusively deprived of his day in court, on this record, because of alleged violations of counsel or want of prosecution.

The case had been pending in court only slightly over nine months when dismissed; c.f., *Link v. Wabash R.R. Co.*, supra. The accident itself happened just over a year prior to dismissal. The petitioner was possessed of full information necessary for trial, and complete proposed pre-trial stipulations were available to it on October 30, 1964. No trial delay would have resulted since the respondent was ready to proceed on the scheduled trial date.

The Court below properly held that the trial court abused its discretion in imposing the harsh sanction that it did.

It is thus seen that on a unique and peculiar factual situation the Fifth Circuit Court of Appeals merely reviewed for an abuse of discretion and found one here. The case is totally unlike the other extreme cases in which final dismissal was approved as a proper exercise of discretion. On peculiar facts, the Fifth Circuit in evaluating this record found an abuse of discretion. This decision, therefore, conflicts with nothing. Indeed, the principle of the *Link* case, supra, was recognized.

There is no reason to grant the writ of certiorari in this routine case. No important Federal question was decided and it appears that indeed the trial court did abuse its discretion. In all events, no special reason for granting the writ has been shown and the case presents no substantial or important question to be settled by this court. No new principle of law has been pronounced or no departure from established principles of law or procedure has been shown.

V

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER H. BECKHAM
Attorney for Respondent
2nd Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Richard F. Ralph, Esq., Counsel for Petitioner, 510 Northeast Airlines Building, 150 S.E. Second Avenue, Miami, Florida 33131, this 3rd day of June, 1968.

WALTER H. BECKHAM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,

Petitioner,

versus

ALBERT FLAKSA

Respondent.

Reply Brief of Petitioner on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RICHARD F. RALPH
510 Northeast Airlines Building,
Miami, Florida 33131
Attorney for Petitioner

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STATEMENT

The District Court's action flowed from found failure by Respondent to prepare and thereby prosecute his claim. The Court of Appeals concurred in this finding.

Respondent's attorneys so stated in requesting Petitioner to agree to a proposed continuance of ordered pretrial conference (Pet. App. 15; R. 151, 195).

Respondent's petition for continuance of pre-trial conference stated, without other explanation, his attorneys had been "unable" to complete discovery (Pet. App. 15; R. 138). No discovery had ever been instituted by Respondent before or after the July 10, 1964, order for pre-trial and trial (Pet. App. 15-16) prior to a sham motion to produce and inspect the vessel "Ducky" over a year following the occurrence, which was contrary to the order (Pet. App. 16; R. 42-43) and accompanied the petition for continuance (Pet. App. 15; R. 137).

A comparison of the deposition of Respondent in April, 1964 (eg. R. 112-113, 124, 131), Respondent's belated answers (Pet. App. 15; R. 59, 61-66) to interrogatories 6-7 (R. 51-52), 11-15 (R. 53-54), and Respondent's proposed stipulation (R. 163) subsequent to both the ordered pre-trial conference date of October 19, 1964, (Pet. App. 15; R. 40) and to the ordered hearing thereafter held on October 30, 1964, (Pet. App. 16; R. 147) reflect that only in the latter proposed stipulation is information, including the identity of numerous witnesses, never before disclosed by Respondent.

Lack of excusable neglect, mistake, or inadvertence on the part of the Respondent; and a continued communicated desire on the part of the Petitioner to comply on its part with the pre-trial order as found by the District Court (Pet. App. 15; R. 196-197) and the Court of Appeals (Pet. App. 7-9), is evident from Petitioner's repeated communications to Respondent's attorneys seeking first the answers to its interrogatories and thereafter ordered production of documents (Pet. App. 15; R. 66-67) which in all events were material to the pre-trial meeting of counsel (Pet. App. 15; R. 42).

No allegation exists, nor does the record suggest, that the pre-trial and trial assignments given this case by the July 10, 1964 order were unreasonable, oppressive, or other than a proper management of the case and the District Court's calendar.

Against the record background, the Court of Appeals considered "whether the order was too drastic under the circumstances" (Pet. App. 7); the fault and where it lay was clear (Pet. App. 7-9).

ARGUMENT

The Court of Appeals created and imposed improper criteria upon the authority and exercised sound judicial discretion of the District Court.

A. Creation and Imposition of Improper Criteria.

With a record background of dereliction and failure on the part of Respondent's attorneys and agents at every stage of the proceeding from the time issue was joined (Pet. App. 8), which permeated the reasonable pre-trial and trial assignments, the Court of Appeals improperly created and imposed limiting conditions precedent, of disciplinary action against the erring attorneys or other lesser sanctions, where the facts are not such as to indicate that the litigant is a participant in the fault.

Respondent does not, and cannot, square such criteria for measuring authorized dismissals with prejudice, in the sound exercise of judicial discretion by District Courts, with this Court's decision in **Link v. Wabash R. R. Co.** (1962) 370 U.S. 262, or related cases.

B. **Exercised Sound Judicial Discretion of District Court.**

Measured by proper criteria the District Court exercised sound judicial discretion in defaulting Respondent.

A trial court from personal observation and from knowledge of its calendar is in a better position to judge what justice required under the circumstances than a Court of Appeals from a cold record. A District Court must have broad discretion in the making of trial assignments and in holding parties to assignments reasonably made in the absence of valid grounds for continuance. e.g. **Janousek v. French** (8th Cir., 1961) 287 F2d 616, 622-623.

It is to the interest of everyone concerned with the proper administration of justice that District Courts should move cases forward for trial and dispose of them promptly when they are reached except where clear and compelling reasons supported by unequivocal and detailed facts require some further adjournment. e.g. **Joseph v. Norton Company** (2d Cir., 1959) 273 F2d 65, 67.

Lack of preparation is not a ground for obtaining a continuance, unless there is a valid reason for such lack; and a District Court's evaluation of the parties' diligence in the preparation of a case carries almost commanding weight. e.g. **United States v. Pacific Fruit & Produce Co.** (9th Cir., 1943) 138 F2d 367.

Moreover, an order of dismissal may be granted, notwithstanding the claimant has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence. e.g. **Hicks v. Bekins Moving & Storage Co.** (9th Cir., 1940) 115 F2d 406.

The instant case is clearly different from the cases relied upon by Respondent, including **Woodham** v. **American Cystoscope Company of Pelham, New York** (5th Cir., 1964) 335 F2d 551, 556, as recognized by the Court of Appeals therein: "There was no want of prosecution by the plaintiff or her attorney. Nor do we have a willful violation of a court order and facts from which it could be inferred that the plaintiff had long been deliberately proceeding in a dilitory fashion".

Excusable neglect, mistake, or inadvertence, found in **Council of Federated Organizations** v. **Mize** (5th Cir., 1964) 339 F2d 899, 900, do not exist here.

International Harvester Co. v. **Rockwell Spring & Axle Co.** (7th Cir., 1964) 339 F2d 949, 952, involved no failure to prosecute, was not at issue, and was a protective action pending outcome of other proceedings in the court of claims.

Failure to file an **ex parte** pre-trial statement due to oversight in reference to a prepared case in **Gamble** v. **Pope A. Talbot** (3d Cir., 1962) 307 F2d 729, and the authority of the court to impose sanctions therefor, is not controling in the instant circumstances.

We are not dealing here with either diligent prosecution or an unauthorized, oppressive, or improper order as was the case in **Padovani** v. **Bruchhausen** (2d Cir., 1961) 293 F2d 546, 548.

Even the dubious case of **Durham** v. **Florida East Coast R. R. Co.** (5th Cir., 1967) 385 F2d 366, 367-368, wherein personal fault of the litigant respecting the "new" evidence was indicated, is not controling here.

Long standing lack of preparation of case before and after July, 1964, order for pre-trial and trial on dates admittedly reasonable, permeating disposal of cases by pre-trial and trial, rendered District Court's action within authority and exercised sound judicial discretion of District Courts measured against established criteria.

The mandatory, artificial, criteria as created and applied by the Court of Appeals renders available, for a price, continuances for which no valid ground exists.

CONCLUSION

Contrary to this Court's Link decision, and contrary to the authority and exercise of sound judicial discretion of District Courts as understood and administered in other Circuits; the decision below is clearly erroneous. This petition for a writ of certiorari should therefore be granted.

Summary reversal is appropriate in this case under this court's practice not only where the law is settled by a prior decision, but also where the action of the Court of Appeals is clearly improper.

Respectfully submitted,

RICHARD F. RALPH
510 Northeast Airlines Building,
Miami, Florida 33131
Attorney for Petitioner